IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

MERCY CRYSTAL LAKE HOSPITAL AND MEDICAL CENTER; MERCY HARVARD HOSPITAL, INC.; and MERCY ALLIANCE, INC.,

Plaintiffs,

vs.

ILLINOIS HEALTH FACILITIES and SERVICES REVIEW BOARD; DALE GALASSIE, in his official capacity as Chairman of the Illinois Health Facilities and Services Review Board; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; DR. LAMAR HASBROUCK, in his official capacity as Acting Director; Illinois Department of Public Health; CENTEGRA HEALTH SYSTEM; CENTEGRA HOSPITAL – HUNTLEY; and ADVOCATE HEALTH AND HOSPITALS CORPORATION D/B/A ADVOCATE GOOD SHEPHERD HOSPITAL,

Defendants.

No.: 12 MR 1824
consolidated with
12 MR 1840

FILED
2013 NOV -8 AM 10: 38
CLERK, CIRCUIT COURT
WILL COUNTY, ILLINOIS

ADVOCATE HEALTH AND HOSPITALS CORPORATION,

Counter-Plaintiff,

vs.

MERCY CRYSTAL LAKE HOSPITAL AND MEDICAL CENTER; MERCY HARVARD HOSPITAL, INC.; and MERCY ALLIANCE, INC., ILLINOIS HEALTH FACILITIES AND SERVICES REVIEW BOARD; DALE GALASSIE, in his official capacity as Chairman of the Illinois Health Facilities and Services Review Board; ILLINOIS DEPARTMENT OF PUBLIC HEALTH; DR. LAMAR HASBROUCK, in his official capacity as Acting Director; Illinois Department of Public Health; CENTEGRA HEALTH SYSTEM; CENTEGRA HOSPITAL – HUNTLEY,

Counter-Defendants.

# ORDER

This matter coming before the Court after hearing on the Complaint for Administrative Review and the Counter-Complaint for Administrative Review, with due notice having been given and the Court having considered the briefs and arguments of counsel, as well as the applicable statutory and case law, it is ORDERED:

Complaint for Administrative Review - Mercy

Plaintiffs, Mercy Crystal Lake Hospital and Medical Center, Mercy Harvard Hospital, Inc., and Mercy Alliance, Inc. (hereinafter collectively "Mercy"), filed this Complaint for Administrative Review seeking judicial review of the Illinois Health Facilities and Services Review Board (hereinafter "Board") decision approving Centegra Health System and Central Hospital – Huntley's (hereinafter collectively "Centegra") application for a Certificate of Need (hereinafter "CON") permit to establish a new hospital in Huntley, Illinois. The Complaint alleges that the Illinois Department of Public Health (hereinafter "IDPH") provides services and staff support to the Board; that the staff is responsible for evaluation whether applications for CON permits meet the Board's criteria; that the IDPH staff twice reviewed Centegra's application and twice determined that Centegra failed to meet the Board's requrirements; that the Board reviewed Centegra's application and agreed with the IDPH staff decision and issued an Initial Denial in December 2011; that the Board subsequently reconsidered Centegra's application limited to an expert report authored by Krentz Consulting opposing Centegra's project; that the Board then without explanation or discussion reversed its prior decisions and approved Centegra's application; that on July 30, 2012, the Board issued a permit approval letter to Centegra and this action was thereafter timely commenced.

The Complaint further alleges that Mercy Crystal Lake Hospital and Medical Center (hereinafter "Mercy Crystal Lake") applied for a CON permit to establish an acute-care hospital in Crystal Lake and that although the Board issued an intent to deny, the Board is scheduled to conduct a limited reconsideration of Mercy Crystal Lake's permit application and if approved, the proposed hospital would be less than 10 miles from the proposed Centegra hospital; that Mercy Crystal Lake thereafter intervened as a party opposing Centegra's application; that Mercy Harvard Hospital Inc. (hereinafter "Mercy Harvard") is located in the same health service area and planning area as Centgra's proposed hospital which would be in the same area and that Mercy Harvard intervened as a party opposing the application; that Mercy Alliance Inc. (hereinafter "Mercy Alliance") has thirteen multi-specialty medical clinics located in ten communities in the same health service area as Centegra's proposed hospital; and that Mercy Alliance intervened as a party opposing Centegra's application.

The Complaint contends that Dale Galassie is the Chairman of the Board; that the Dr. LaMar Hasbrouck is the Acting Director of the IDPH; that Centegra Hospital-Huntley filed its application to construct the proposed hospital in Huntley on December 29, 2010; and that Advocate Health and Hospitals Corporation (hereinafter "Advocate") is an Illinois not-for-profit corporation who intervened as a party opposing Centegra's application.

The Complaint describes the purpose and requirements of the Illinois Health Facilities Planning Act (hereinafter the "Act"), as well as the requirements of the Board in evaluating permit applications and the review criteria as set forth in the Board's regulations. The Complaint provides background regarding the application filed by Centegra and the public hearing held regarding Centegra's application on February 16, 2011; that the IDPH staff issued a State Agency Report (hereinafter "SAR") for the Centegra project indicating that the Centegra application failed to meet three of the Board criteria; that the Board issued an Intent to Deny Centegra's application at its June 28, 2011 meeting; that the Board requested Centegra address additional questions; that thereafter Centegra made a supplemental application as requested; that the IDPH staff reviewed the supplemental application and determined in the Supplemental State Agency Report (hereinafter "Supplemental SAR" or "SSAR") that Centegra again failed to demonstrate compliance with the Board criteria; that at its December 7, 2011 meeting the Board again voted to deny Centegra's application and identified that the supplemental application failed to comply with the Board's criteria.

The Complaint thereafter notes that Centegra requested an additional hearing and administrative proceedings were conducted by Administrative Law Judge Richard Hart; that during the proceedings, Board attorneys discovered that the record was missing two reports authored by Krentz Consulting LLC that opposed Mercy Crystal Lake's and Centegra's applications; that thereafter, the Board's attorneys spoke with Chairman Grassie who directed the Board attorneys to request that both applications were to be returned to the Board for review and reconsideration; and that thereafter the Administrative Law Judge filed a report with the Board recommending that the Board include the Krentz Centegra report and exclude the Krentz Mercy report and reconsider Centegra's application with the corrected record.

The Complaint further alleges that at the meeting on June 5, 2012, the Board adopted the Administrative Law Judge's recommendations to correct Centegra's record; that the Board ruled it would conduct a limited reconsideration of Centegra's application based only on the addition of the Krentz Centegra report; that the Board denied a motion to allow for an opportunity for a public hearing and written public comments as to its limited reconsideration of Centegra application based on the report; that the Board thereafter voted 6-3 to approve Centegra's application; and that the Board had no public discussion and provided no rationale as to why it reversed its previous denials.

The Complaint finally alleges that Centegra's application does not meet the Board's criteria and contends that the Board's decision must be reversed because the decision is against the manifest weight of the evidence and was arbitrary and capricious.

Counter-Complaint for Administrative Review - Advocate

Defendant Advocate Health and Hospitals Corporation (hereinafter "Advocate") filed a Counter-Complaint seeking judicial review of the final administrative decision of the Board approving Centegra's application for CON permit to establish a new hospital in Huntley. The Counter-Complaint contains similar allegations to the Complaint for Administrative Review and requests that this Court grant Plaintiffs' request for administrative review and reverse the Board's approval of Centegra's application for a CON permit.

Complaint for Administrative Review – Sherman Hospital

Sherman Hospital and Sherman Health Systems (hereinafter collectively "Sherman") filed this Complaint seeking review of the same decision. The Complaint alleges that Sherman is located approximately 20 minutes from the proposed Centegra site and within the same Health Service Area (hereinafter "HSA VIII") and that Sherman would be adversely affected if Centegra is allowed to construct its proposed facility. The Complaint contains similar allegations and background as noted above in the Complaint and Counter-Complaint and seeks judicial review of the final administrative decision of the Board approving Centegra's application for CON permit to establish a new hospital in Huntley.

Decision of the Board – September 24, 2013

The decision issued by the Board on September 24, 2013 made specific findings that the Board was affirming its prior written decision of September 11, 2012. (Supp Rec. at p. 4.) The Board further found that it adopted the SAR and the SSAR for June 28, 2011 and December 6-7, 2011 meetings. (Supp Rec. at p.4, Rec. at pp. 1747-82, 2003-37.) The Board considered the Centegra application and attachments. (Supp. Rec. at p. 4, Rec. at pp. 2-520.) The Board further considered the public hearing written transcript of February 16, 2011 and the 67 public participation comments from individuals who supported or were opposed to said project. (Supp. Rec. at p. 5, Rec. at pp. 537-773, 800-1685.)

The Board thereafter made the following conclusions. The Board determined that the applicant's background, purpose and alternatives to this project were acceptable. (Supp. Rec. at p. 5, Rec. at pp. 1759-61, 2016-19.) The Board determined that the following criteria were met: size of the project, project services utilization, size of project and utilization, and assurances regarding target occupancy, staffing availability, performance requirements, and assurances regarding occupancy standards for each proposed category of services. (Supp. Rec. at p. 5, Rec. at pp. 1755, 1762-65, 2019-22.) The Board determined that the following financial and economical feasibility criteria were met: availability of funds, financial viability, reasonableness of financing arrangements, conditions of debt financing, reasonableness of the project and related costs, projected operating costs, and total effect of the project on capital costs. (Supp. Rec. at p. 5, Rec. at pp.63-82, 1755-56, 2013-15.)

The Board determined that the need for medical surgical and intensive care beds was increasing in the planning area of Centegra's proposed hospital, based upon the Board staff reviews from June 2011 to July 2012. (Supp. Rec. at p. 5, Rec. at pp. 2006-07.) The Board noted that the need for medical surgical beds increased from 83 to 138 beds and the need for intensive care unit (ICU) beds increased from 8 to 18 bed, and the demand for Centegra's hospital was based upon the increase in calculated bed need and projected 13% population growth in the planning area from 2010-18. (Supp Rec. at p. 5, Rec. at pp. 2006-07.)

The Board specifically noted that it disagreed with the IDPH Staff finding that the Centegra project was not needed and that it would lead to unnecessary duplication or maldistribution of health care services. (Supp. Rec. at p. 6, Rec. at pp.1766-71, 2022-28.) The Board noted that it considered the establishment of Centegra's 128 bed, acute care hospital

would improve access to hospital services and create a more comprehensive and orderly health care delivery system in the planning area. (Supp Rec. at p. 6.) In addition, the Board considered the number of beds requested by Centegra met the planning area's need requirement, as well as the October 2011 update to the inventory of health care facilities and services and need determination, which showed a calculated increased bed need by 2018, to establish that Centegra's proposed project would improve access to health care and help fulfill the need for medical surgical, intensive care and obstetrical beds. (Supp. Rec. at p. 6, Rec. at pp. 1765-70, 2015-20.)

The Board further found that the applicants met all of the financial and economical review criteria, specifically that the Centegra provided evidence of an "A-" rating from Standard and Poor's for Centegra Health System on the Illinois Health Facilities Authority 1998 revenue bonds and its "A-" underlying rating on the Illinois Health Facilities Authority 2002 revenue bonds issued by Centegra Health System (Supp. Rec. at p. 6, Rec. at pp. 469-74, 2032-36.) Thus, the Board concluded Centegra had the financial resources to complete this project. (Supp. Rec. at p. 6.)

The Board further determined that the applicants met the State Standards for all clinical departments/services in which the State Board has size standards. (Supp. Rec. at p. 6, Rec. at pp. 1762-63, 2019-20.) The Board noted that the applicants provided evidence of 3 census tracts within the Planning Area A-10 which were designated as a Medically Underserved Population, 1 census tract in the primary service area designated as Medically Underserved Area/Population, four townships in the market area designated as Health Manpower Shortage Areas. (Supp. Rec. at pp. 6-7, Rec. at pp. 112-13, 128-33.) The Board cited this evidence as further support for its decision. (Supp. Rec. at p. 7.)

The Board noted that there would be bonds issued through the Illinois Health Finance Authority to finance the debt and the selected form of debt financing would be at the lowest net cost available. (Supp. Rec. at p. 7, Rec. at p.476.) The Board also considered that a portion of the project would involve leasing capital equipment, with expenses less costly than purchasing new equipment and felt that this was in conformance with the Board's health care, cost containment objective. (Supp. Rec. at p. 7, Rec. at pp. 63-82, 2032-36.)

Finally, the Board noted that Centegra complied with 17 out of 20 applicable criteria and determined that the three noncompliant criteria did not outweigh the positive aspects of this project. (Supp. Rec. at p. 7.) The Board determined that Centegra complied with the financial and economic criteria and thus, the Board approved the issuance of a permit because it ultimately determined that the project was in substantial conformance with the Board's applicable standards and criteria. (Supp. Rec. at p. 7.)

Standard of Review

Section 3-110 of the Administrative Review Act states:

> Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or

> additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

735 Ill. Comp. Stat. Ann. 5/3-110 (West). The applicable standard of review depends on whether the question presented to the court is one of fact, of law or a mixed question of fact and law. In addition, the standard of review also determines the degree of deference given to the agency's decision. AFM Messenger Service v. Department of Employment Security, 198 Ill. 2d 380, 390, 763 N.E.2d 272, 279 (2001).

If the case on review presents a question of fact, the applicable review standard is whether the agency's finding of facts are against the manifest weight of the evidence. It is the role of the agency to resolve conflicts in the evidence, to assess the credibility of witnesses and to assign weight to their testimony. See Paganelis v. Industrial Comm'n, 132 Ill. 2d 468, 483-84, 548 N.E.2d 1033 (1989); Edward Hines Precision Components v. Industrial Comm'n, 356 Ill. App. 3d 186, 825 N.E.2d 773 (2d Dist. 2005); Navistar International Transp. Corp. v. Industrial Comm'n, 331 Ill. App. 3d 405, 771 N.E.2d 35 (1st Dist. 2002). The reviewing court will not set aside the Commission's decision unless it is contrary to law or its fact determinations are against the manifest weight of the evidence. Roberson v. Industrial Comm'n, 225 Ill. 2d 159, 866 N.E.2d 191 (2007). In order for a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. Edward Hines Precision Components, 356 Ill. App. 3d at 194, 825 N.E.2d at 782.

When the review involves a mixed question of law and fact – that is questions that require an examination of the legal effect of a given set of facts – the standard is whether the Board's decision was clearly erroneous. Oleszczuk v. Dept. of Employment Security, 336 Ill. App. 3d 46, 782 N.E.2d 808 (1st Dist. 2002). Applying this standard provides deference to the agency's experience and expertise. City of Belvidere v. Illinois State Labor Relations Board, 181 Ill.2d 191, 692 N.E.2d 295 (1998). An agency decision is clearly erroneous when the review of the record leaves the court with a "definite and firm conviction that a mistake has been committed." Oleszczuk, 336 Ill. App. 3d at 50, 782 N.E.2d at 812. In Provena Health v. Illinois Health Facilities Planning Bd., 382 Ill. App. 3d 34, 886 N.E.2d 1054 (1st Dist. 2008), the Court stated:

> A mixed question of law and fact "involves an examination of the legal effect of a given set of facts." City of Belvidere v. Illinois State Labor Relations Board, 181 Ill. 2d 191, 205, 229 Ill. Dec. 522, 692 N.E.2d 295 (1998). The Board's decision is, in part, factual because it involves deciding whether the facts support the issuance of a permit to Sherman. The Board also had to determine the legal effect of its regulations and resolve the potential conflict between the statute and the regulations. Accordingly, we apply a clearly erroneous standard of review. City of Belvidere, 181 Ill. 2d at 205, 229 Ill. Dec. 522, 692 N.E.2d 295.
>
> Under this standard, while the agency's decision is accorded deference, a reviewing court will reverse the decision where there is evidence supporting reversal and the court "is left with the definite and firm conviction that a mistake has been committed." AFM

> Messenger Service, Inc. v. Department of Employment Security, 198 Ill. 2d 380, 393, 261 Ill. Dec. 302, 763 N.E.2d 272 (2001), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (1948). . . .

Provena Health, 382 Ill. App. 3d at 38-39, 886 N.E.2d at 1059-60. The court further noted:

> The Board has the power to prescribe rules and regulations to carry out the purpose of the Act and to develop criteria and standards for health care facilities planning. 20 ILCS 3960/12(1), (4) (West 2004). The Department shall "review applications for permits and exemptions in accordance with the standards, criteria, and plans of need established by the State Board under this Act and certify its finding to the State Board." 20 ILCS 3960/12.2(1) (West 2004). As the CON applicant, [the applicant] has the burden of proof on all issues pertaining to its application. 77 Ill. Adm.Code § 1130.130(a) (2006).
>
> The Board is to approve and authorize the issuance of a permit if it finds (1) the applicant is fit, willing, and able to provide a proper standard of health care service for the community, (2) economic feasibility is demonstrated, (3) safeguards are provided assuring that the establishment or construction of the health care facility is consistent with the public interest, and (4) the proposed project is consistent with the orderly and economic development of such facilities and equipment and is *in accord with standards, criteria, or plans of need adopted and approved pursuant to the provisions of Section 12 of this Act.* (Emphasis added.) 20 ILCS 3960/6(d) (West 2004).

Provena Health, 382 Ill. App. 3d at 39, 886 N.E.2d at 1060. Our Supreme Court has provided the following guidance in these cases as well:

> Agency action is arbitrary and capricious if the agency: (1) relies on factors which the legislature did not intend for the agency to consider; (2) entirely fails to consider an important aspect of the problem; or (3) offers an explanation for its decision which runs counter to the evidence before the agency, or which is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. [citation omitted] While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary. [citation omitted] The standard is one of rationality. The scope of review is narrow and the court is not, absent a "clear error of judgment" [citation omitted], to substitute its own reasoning for that of the agency.

Greer v. Illinois Hous. Dev. Auth., 122 Ill. 2d 462, 505-06, 524 N.E.2d 561, 581 (1988).

If the case presents a pure question of law, then the standard of review is de novo. Carpetland v. Illinois Department of Employment Security, 201 Ill. 2d 351, 369, 776 N.E.2d 166, 177 (2002).

Arguments of the Parties

Mercy contends that the Board's decision was arbitrary and capricious and that the Board's decision was clearly erroneous, in part because it is based on outdated population projections and bed need calculations, which are contradicted by the Board's own 2013 Inventory of Hospital Beds which was released while the Board was preparing its response to the Court's request for clarification. Mercy further contends that the Board improperly affirmed its prior decision to approve Centegra's application.

Sherman contends that the Board's approval of Centegra's application was arbitrary and capricious, an abuse of discretion, and contrary to the evidence; that the harmless technical error of the report misfiling did not justify remand or reversal by the Administrative Law Judge; and that the Administrative Law Judge did not have the legal authority to remand the case.

Advocate contends that the Board had no legal authority to reconsider its denial of the Centegra application; that the Board's decision was clearly erroneous; that the failure to require physician referral letters from Centegra was arbitrary and capricious; that the Board's prohibition of written comments after remand by the Administrative Law Judge was arbitrary and capricious; that upon remand by this Court in July 2013, the Board improperly considered ex parte material; and that there were "anomalies" under the Open Meetings Act in the Board's September 2013 meeting.

Centegra counters by arguing that the evidence submitted supports the Board's decision; that its project satisfied all 22 review criteria; that even if Centegra's project did not meet three criteria, the record still supports the Board's determination that the project substantially complied with the Board's standards; that Sherman, Mercy and Advocate waived all procedural and technical objections; and that Sherman, Mercy and Advocate's rights were not materially affected as they were all afforded the opportunity to address the Board prior to the July 24, 2012 vote and none objected that the Board's consideration of the project materially affected their rights.

Failure to Provide Physician Referral Letters or Establish Rapid Population Growth

Advocate contends that Centegra failed to provide physician referral letters or establish rapid population growth as required by 77 Ill. Admin. Code 1110.530(b)(3), which states:

> 3) Service Demand - Establishment of Bed Category of Service The number of beds proposed to establish a new category of service is necessary to accommodate the service demand experienced annually by the existing applicant facility over the latest two-year period, as evidenced by historical and projected referrals, or, if the applicant proposes to establish a new hospital, the applicant shall submit projected referrals. The applicant shall document subsection (b)(3)(A) and either subsection (b)(3)(B) or (C):

A) Historical Referrals

If the applicant is an existing facility, the applicant shall document the number of referrals to other facilities, for each proposed category of service, for each of the latest two years. Documentation of the referrals shall include: patient origin by zip code; name and specialty of referring physician; name and location of the recipient hospital.

* * *

C) Project Service Demand - Based on Rapid Population Growth

If a projected demand for service is based upon rapid population growth in the applicant facility's existing market area (as experienced annually within the latest 24-month period), the projected service demand shall be determined as follows:

i) The applicant shall define the facility's market area based upon historical patient origin data by zip code or census tract;

ii) Population projections shall be produced, using, as a base, the population census or estimate for the most recent year, for county, incorporated place, township or community area, by the U.S. Census Bureau or IDPH;

iii) Projections shall be for a maximum period of 10 years from the date the application is submitted;

iv) Historical data used to calculate projections shall be for a number of years no less than the number of years projected;

v) Projections shall contain documentation of population changes in terms of births, deaths, and net migration for a period of time equal to, or in excess of, the projection horizon;

vi) Projections shall be for total population and specified age groups for the applicant's market area, as defined by HFPB, for each category of service in the application; and

vii) Documentation on projection methodology, data sources, assumptions and special adjustments shall be submitted to HFPB.

Ill. Admin. Code tit. 77, § 1110.530. Centegra agrees that its application was based on rapid population growth. The SAR and the Supplemental SAR both determined that Centegra properly met the criteria. (Rec. at pp. 1765-69, 2022-26.) The SAR and Supplemental SAR cited that the market for the proposed hospital area was located within Planning Area A-10; that the applicants provided a Market Assessment and Impact Study prepared by Deloitte and Touche Financial Advisory Services that identified population growth by zip code; that the applicants concluded the population would increase by 13% from 2010 to mid 2018 with the population in the primary market area increasing from 15% from 2010 and the secondary market area by 9%. (Rec. at pp.

1769, 2025.) The Supplemental SAR also relief upon the October 2011 Update to the Inventory of Health Care Facilities and Services and Need Determination. (Rec. at p. 2025.) In the Supplemental SAR, the Staff noted a calculated need for 138 medical surgical beds in this planning area by 2018. (Rec. at p. 2025.) The Board determined that the information provided was sufficient. (Supp. Rec. at p. 6.) Thus, the Board's determination was not arbitrary and capricious.

Administrative Law Judge Authority to Remand and Procedures Upon Remand in June and July 2012

Both Advocate and Sherman contend that the Administrative Law Judge did not have the authority to remand the matter to correct the record. (Rec. at pp. 2376-80.) However, the record reflects that the Administrative Law Judge recommended that the Board reconsider the application for permit with the corrected record. (Rec. at p. 2379) The Administrative Law Judge can make recommendations to the Board. 77 Ill. Admin. Code 1130.1130(d). There is no authority submitted that the Administrative Law Judge acted beyond his authority in this matter.

Mercy, Advocate and Sherman contend that the Board should not have voted a third time. On March 8, 2012, the Board sent a letter to Centegra indicating that its application was denied on December 11, 2011. (Rec. at pp. 2344-45.) The Board stated:

> If you decide to exercise your right to a hearing [before a hearing officer as allowed under 20 ILCS 3960/10], the Illinois Health Facilities and Services Review Board, shall, within 30 days after the receipt of your request, appoint a hearing officer. The hearing will afford you the opportunity to demonstrate that the application is consistent with the criteria upon which the action of the State Board was based. Following its consideration of the report of the hearing, or upon default of the party to the hearing, the State Board shall make its final determination.

(Rec. at p. 2345.). Thus, in July 2012, the Board did have the authority to take a vote and make its "final determination." Further, the Administrative Law Judge does have the authority to make recommendations to the Board. 77 Ill. Admin. Code 77 Ill. Admin. Code 1130.1130(d). The Court does not find that the Board's consideration after accepting the Administrative Law Judge's recommendation to reconsider with the corrected record was arbitrary and capricious. Unlike CBS Outdoor, Inc. v. Department of Transportation, 2012 IL App (1st) 111387, the procedure in this case allows the decision to proceed to the Administrative Law Judge for consideration and recommendation to the Board. Thus, here the application remained pending during the entire process. This case is more analogous to Bd. of Educ. of Cmty. Consol. High Sch. Dist. No. 230, Cook Cnty. v. Illinois Educ. Labor Relations Bd., 165 Ill. App. 3d 41, 48, 518 N.E.2d 713, 717 (4th Dist. 1987). The Board here did not act outside of its authority in making a final determination.

Advocate contends that when the matter was returned for limited reconsideration by the Administrative Law Judge, the Board improperly prohibited written comment. The applicable rule states:

a) Provision for and Types of Written Comments

1) Written comments regarding an application and any supplemental information pertaining to an application shall be submitted in accordance with the Notice of Review requirements of this Subpart, in accordance with public hearing requirements established at the direction of the hearing officer, or in accordance with requirements for additional testimony established as a request from and at the direction of HFSRB.

2) Persons who have previously participated in any public hearings or submitted written comments related to a project shall not repeat previously submitted comments.

b) Submission of Comments

1) Written comments are to be submitted to HFSRB or its Administrator at:

Illinois Health Facilities and Services Review Board
525 West Jefferson St., 2nd Floor
Springfield IL 62761

2) Those written comments that have been addressed and submitted as described in this subsection will be included as part of the public record, provided that such comments have been received within the prescribed time frame and in accord with the requirements of this Subpart. Persons submitting comments are responsible for assuring that the Board's staff receive the comments within the prescribed time frame. No person shall knowingly provide ex parte comment to any HFSRB member or staff in contravention of Section 1130.630(d) (see 20 ILCS 3960/4.2).

c) Format of Comments

1) Written comments shall contain a signature and the name and address of the person submitting the comments. Written comments shall be on 8½ by 11" paper .

2) All written comments shall be submitted within the allowable time frames established in Sections 1130(b) and 1130.920(a)(5), and shall be sent only by any recognized overnight courier or personal delivery service.

3) Written comments submitted by email or fax will not be accepted.

d) Forwarding of Comments to HFSRB and to Applicant

All written comments that are received within the specified time frame will be forwarded by HFSRB staff to HFSRB members and to the applicant in advance of the HFSRB meeting date.

e) Ex Parte Comments

Written comments that are received after the prescribed date shall be considered ex parte and shall not be forwarded to HFSRB or to the applicant.

f) Validity of Comments

1) Written comments filed with HFSRB or oral statements made under oath to HFSRB under any Board matter that are subsequently found to be false or inaccurate will serve as a basis for an HFSRB investigation of the matter.

2) HFSRB may require the person who made the false or inaccurate comments or statements to appear before the Board. HFSRB may censure that person. Further, HFSRB may determine that person to be ineligible to provide written comments or oral statements concerning any future Board considerations.

Ill. Admin. Code tit. 77, § 1130.950. In this case, the Notice of Public Hearing and Written Comment required by April 20, 2011. (Rec. at p. 532.) The Board received volumes of written comment from the June 2011 hearing. The record does not reflect that any further written comments were requested or provided by the December 2011 meeting. Further, when the Board met in December 2011 and in June and July 2012, the Board allowed oral comment. The rules do not appear to contemplate a requirement for additional written comment by the Board before the July 2012 meeting. See Charter Med. of Cook Cnty., Inc. v. HCA Health Servs. of Midwest, Inc., 185 Ill. App. 3d 983, 989, 542 N.E.2d 82, 85 (1st Dist. 1989) (the court's review of the Board's interpretation and application of its own rules is limited to determining whether such interpretation and application is plainly erroneous or inconsistent with long-settled construction.") The Board's decision to prohibit written comment on the before the July 2012 meeting was not plainly erroneous nor arbitrary and capricious.

Procedures Upon Request for Clarification in July 2013

Advocate, Sherman and Mercy contend that the Board improperly considered ex parte comments by Centegra after remand and that the Board thereafter failed to consider Mercy's ex parte comments. When this Court remanded the case to the Board for clarification in July 2013, both Advocate and Mercy submitted letters in support of their position by September 4, 2013, which was at least twenty days in advance of the Board meeting of September 24, 2013. Centegra thereafter submitted additional information dated September 10, 2013. According to the Table of Contents for the Supplemental Record, this material was considered "Ex-Parte Communication." Mercy submitted additional materials on September 23, 2013, and according to the Table of Contents for the Supplemental Record, this material was considered "Ex-Parte Communication, and due to date of receipt, this letter was not provided to Board Member." Advocate contends that the Board improperly considered Centegra's letter, and then failed to properly thereafter consider Mercy's ex parte letter submitted on September 23, 2013. Thus, Advocate contends that the Board acted arbitrarily and capriciously.

Although it is clear that the Board did not see Mercy's ex parte submission of September 23, 2013, there is no evidence that the Board actually relied upon any of the submissions, which were submitted long after public comment on this project closed in 2011. This Court simply requested a clarification of the Board's prior ruling. The Board has the authority to interpret its own rules and the actions of the Board do not appear to be plainly erroneous or arbitrary and capricious.

Advocate and Sherman further argue that the record shows "anomalies relative to the Open Meetings Act" by the Board. (Advocate Supplemental Brief, at p. 9.) Advocate and Sherman contend that at the September 24, 2013 meeting, the Board went into Executive Session, emerged from Executive Session and then took a vote with no discussion or explanation on the record. On September 24, 2013, the Board recessed into Executive Session, citing Section (2)(c)(11) of the Open Meetings Act. (Supp. Rec. at p. 391.)

Section 2(c)(11) states:

> (c) Exceptions. A public body may hold closed meetings to consider the following subjects:
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> * * *
>
> (11) Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

5 ILCS 120/2. Section 2(e) further states:

> (e) Final action. No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

5 ILCS 120/2. Advocate and Sherman do not contend that the Board improperly recessed into Executive Session, nor do Advocate and Sherman contend that final action was taken in open session. Rather, Advocate and Sherman contend that the Board did not discuss the matter publicly when it came out of closed session. However, Advocate and Sherman do not cite any specific provision of the Open Meetings Act which was violated and as such this argument is rejected.

Mercy argues that the Board improperly voted to affirm its prior decision and failed to consider its 2013 Inventory of Hospital Beds which was released while the Board was preparing its response to the Court's request for clarification, fourteen months after the Board approved the application and while the matter is pending in this Court on administrative review. Again, this Court simply requested a clarification of the Board's prior ruling. The matter is on appeal and the Board's action in not considering the 2013 Inventory of Hospital Beds, at this stage of the proceedings, was not clearly erroneous. Further, Mercy has provided no authority to support its

Although it is clear that the Board did not see Mercy's ex parte submission of September 23, 2013, there is no evidence that the Board actually relied upon any of the submissions, which were submitted long after public comment on this project closed in 2011. This Court simply requested a clarification of the Board's prior ruling. The Board has the authority to interpret its own rules and the actions of the Board do not appear to be plainly erroneous or arbitrary and capricious.

Advocate and Sherman further argue that the record shows "anomalies relative to the Open Meetings Act" by the Board. (Advocate Supplemental Brief, at p. 9.) Advocate and Sherman contend that at the September 24, 2013 meeting, the Board went into Executive Session, emerged from Executive Session and then took a vote with no discussion or explanation on the record. On September 24, 2013, the Board recessed into Executive Session, citing Section (2)(c)(11) of the Open Meetings Act. (Supp. Rec. at p. 391.)

Section 2(c)(11) states:

> (c) Exceptions. A public body may hold closed meetings to consider the following subjects:
>
> * * *
>
> (11) Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting.

5 ILCS 120/2. Section 2(e) further states:

> (e) Final action. No final action may be taken at a closed meeting. Final action shall be preceded by a public recital of the nature of the matter being considered and other information that will inform the public of the business being conducted.

5 ILCS 120/2. Advocate and Sherman do not contend that the Board improperly recessed into Executive Session, nor do Advocate and Sherman contend that final action was taken in open session. Rather, Advocate and Sherman contend that the Board did not discuss the matter publicly when it came out of closed session. However, Advocate and Sherman do not cite any specific provision of the Open Meetings Act which was violated and as such this argument is rejected.

Mercy argues that the Board improperly voted to affirm its prior decision and failed to consider its 2013 Inventory of Hospital Beds which was released while the Board was preparing its response to the Court's request for clarification, fourteen months after the Board approved the application and while the matter is pending in this Court on administrative review. Again, this Court simply requested a clarification of the Board's prior ruling. The matter is on appeal and the Board's action on remand for clarification of its prior decision, in not considering the 2013 Inventory of Hospital Beds, at this stage of the proceedings, was not clearly erroneous.

Board's Decision of September 24, 2013

In this case, Mercy, Advocate and Sherman contend that the Board has failed to provide a basis for its ruling. However, a review of the Board's decision of September 24, 2013 establishes that the Board has satisfied the requirements of Medina Nursing Center, Inc., v. The Health Facilities and Services Review Board, 2013 IL App (4th) 120554, ___ Ill. App. 3d ___, No. 4-12-0554, slip op. (4th Dist. July 12, 2013). The Board's decision contains findings of fact, findings as to which criteria and standards were met or were not met, statements as to why the Board agreed or disagreed with the SAR and Supplemental SSAR and conclusions by the Board. As such, the Board has provided a sufficient explanation for its decision. Further, as noted above, the record provides evidence to support that decision.

The Illinois Health Facilities Planning Act provides:

> This Act shall establish a procedure (1) which requires a person establishing, constructing or modifying a health care facility, as herein defined, to have the qualifications, background, character and financial resources to adequately provide a proper service for the community; (2) that promotes, through the process of comprehensive health planning, the orderly and economic development of health care facilities in the State of Illinois that avoids unnecessary duplication of such facilities; (3) that promotes planning for and development of health care facilities needed for comprehensive health care especially in areas where the health planning process has identified unmet needs; and (4) that carries out these purposes in coordination with the Center for Comprehensive Health Planning and the Comprehensive Health Plan developed by that Center.
>
> The changes made to this Act by this amendatory Act of the 96th General Assembly are intended to accomplish the following objectives: to improve the financial ability of the public to obtain necessary health services; to establish an orderly and comprehensive health care delivery system that will guarantee the availability of quality health care to the general public; to maintain and improve the provision of essential health care services and increase the accessibility of those services to the medically underserved and indigent; to assure that the reduction and closure of health care services or facilities is performed in an orderly and timely manner, and that these actions are deemed to be in the best interests of the public; and to assess the financial burden to patients caused by unnecessary health care construction and modification. The Health Facilities and Services Review Board must apply the findings from the Comprehensive Health Plan to update review standards and criteria, as well as better identify needs and evaluate applications, and establish mechanisms to support adequate financing of the health care delivery system in Illinois, for the development and preservation of safety net services. The Board must provide written and consistent decisions that are based on the findings from the Comprehensive Health Plan, as well as other issue or subject specific plans, recommended by the Center for Comprehensive Health Planning. Policies and procedures must include criteria and standards for plan variations and deviations that must be updated. Evidence-based assessments, projections and decisions will be applied regarding capacity, quality, value

> and equity in the delivery of health care services in Illinois. The integrity of the Certificate of Need process is ensured through revised ethics and communications procedures. Cost containment and support for safety net services must continue to be central tenets of the Certificate of Need process.

20 ILCS 3960/2. The Board's decision of September 24, 2013 establishes that the Board determined that the project met the requirements of the Act. The Board specifically determined that Centegra had the qualifications, background character and financial resources to provide the proper services for the community. (Supp. Rec. at p. 5; Rec. at pp. 1759-61, 2016-19.) The Board made findings that the October 2011 update to the inventory health care facilities and services and need determination showed a calculated need for 139 medical-surgical beds, 18 intensive care beds, and 22 obstetric beds in the A-10 planning area by 2018 and that this project would improve access to health care. (Supp. Rec. at p. 5; Rec. at pp. 1765-70, 2006-07, 2015-20.) The Board also made a specific finding that it disagreed with the SAR and Supplemental SSAR that the Centegra project was not needed. (Supp. Rec. at p. 6.) The Board further noted that Centegra provided support that the project would increase services to the medically underserved and indigent. (Supp. Rec. at pp. 6-7, Rec. at pp. 112-13, 128-33.) The Board noted that the selected form of debt financing was at the lowest net cost available and also noted that part of the project involved leasing capital equipment, which would be less costly. (Supp. Rec. at pp. 6-7; Rec. at pp. 63-82, 476, 2032-36.) The Board noted that there were included with the application the appropriate safety net impact and charity care statements. Finally, the Board specifically noted that it disagreed with the SAR and Supplemental SAR finding that the project was not needed and that it would lead to unnecessary duplication or maldistribution of health care facilities. (Supp. Rec. at pp. 6-7 Rec. at pp. 1766-71, 2022-28. ) The Board noted that this project would improve access to health services. (Supp. Rec. at p. 7.) As such, the Board determined that Centegra's application was consistent with Section 2 of the Planning Act and that it promoted the purposes of the Act.

In addition, case law provides that even if Centegra fails to meet some criteria, the Board has the ability to approve the application. See Provena Health v. Illinois Health Facilities Planning Board, 382 Ill. App. 2d 34, 886 N.E.2d 1054 (1st Dist. 2008) (permit affirmed even though applicant only met 14 of 21 criteria); Cathedral Rock of Granite City, Inc. v. Illinois Health Facilities Planning Bd., 308 Ill. App. 3d 529, 720 N.E.2d 1113 (4th Dist. 1999) (applicant met 15 of 18 review criteria); Access Ctr. for Health, Ltd. v. Health Facilities Planning Bd., 283 Ill. App. 3d 227, 236, 669 N.E.2d 668, 674 (2d Dist. 1996) ("Section 1130.660 provides, in relevant part, that the 'failure of a project to meet one or more review criteria, as set forth in 77 Ill.Adm.Code 1110, 1230 or 1240 shall not prohibit the issuance of a permit.'"). As the court in Provena Health noted:

> We find section 1130.660 of the regulations allows the Board to grant a permit application even where the Department has found the proposed project not in conformance with all the pertinent review criteria. Both the Board's adoption of regulations and its interpretations of those regulations are presumptively valid and are entitled to deference. Charter Medical, 185 Ill.App.3d at 987, 989, 134 Ill.Dec. 82, 542 N.E.2d 82; Manor Healthcare Corp. v. Northwest Community Hospital, 129 Ill.App.3d 291, 295–96, 84 Ill.Dec. 532, 472 N.E.2d 492 (1984).

Provena Health, 382 Ill. App. 3d at 45-46, 886 N.E.2d at 1065. The Board has the discretion, judgment and expertise to balance the statutory and regulatory criteria. This Court is not to substitute its judgment for that of the Board or to reweigh the evidence. Provena Health, 382 Ill. App. 3d at 47, 886 N.E.2d at 1066-67. Further, case law is clear that the mere fact that an opposite conclusion is reasonable or that a reviewing court may have ruled differently will not justify the reversal of administrative findings. Cathedral Rock, 308 Ill. App. 3d at 545, 720 N.E.2d at 545. As there is evidence to support the decision, it is not clearly erroneous, nor did the Board act arbitrarily and capriciously.

WHEREFORE, for the reasons set forth above, the Board's decision is affirmed. The status date of November 12, 2013 is stricken. The Illinois Attorney General's Office is directed to coordinate with the Will County Circuit Clerk, 57 N. Ottawa St., Joliet, Illinois, regarding transportation and/or disposition of the record. Clerk to notify via facsimile.

11/8/13
Date

Hon. Bobbi N. Petrungaro